87-637

Supreme Court, U.S.
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No. ———

In The

Supreme Court of the United States

October Term, 1987

———o———

CASSANDRA GREEN,

Appellant,

vs.

ARAM FRANKLIN, M.D.,

Appellee.

———o———

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

———o———

JURISDICTIONAL STATEMENT

———o———

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QUESTION PRESENTED

1. Is a taking without just compensation, violative of the Fifth Amendment, effected by a state statute (California Civil Code section 3333.2) which deprives an injured party of 90 percent of the damages awarded by a jury to compensate for pain and suffering?

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JURISDICTIONAL STATEMENT

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Appellant appeals from the final judgment of the Court of Appeal of the State of California, which held California Civil Code section 3333.2 constitutional as against appellant's contention that this statute violates the Taking Without Just Compensation Clause of the Fifth Amendment of the United States Constitution as incorporated by the Fourteenth Amendment. Appellant submits this statement to show that this Court has jurisdiction of the appeal and that a substantial federal constitutional question is presented.

OPINION BELOW

The decision of the California Court of Appeal, dated March 12, 1987, from which this appeal is taken, is reprinted as Appendix A. The July 16, 1987, order of the California Supreme Court denying review and directing the reporter of decisions not to publish the opinion of the Court of Appeal in the Official Appellate Reports is attached hereto as Appendix B.

JURISDICTION

Appellant brought this action for recovery of damages resulting from the medical malpractice of appellee.[1] The matter was tried to a jury in the Los Angeles Superior Court. The jury rendered a verdict for appellant and awarded damages, including damages for pain and suffering of $2,332,762. The defense motion to apply California Civil Code section 3333.2 to reduce the noneconomic award to the statutory maximum sum of $250,000 was denied by the trial court, which held the required reduction in the award unconstitutional on various grounds. On appeal by the defense, the California Court of Appeal upheld section 3333.2 over appellant Green's argument that the mandatory reduction of her pain and suffering award was a taking without just compensation and thus violative of the Fifth Amendment of the United States Constitution. See

[1] The parties to this action are appellant, Cassandra Green and appellee, Dr. Aram Franklin. There are no other parties of record and the only other interested parties of whom appellant is aware is appellee's insurance carrier.

Appendix A. Appellant's timely filed Petition for Review to the California Supreme Court was denied on July 16, 1987. See Appendix B. Appellant then filed a Notice of Appeal to this Court in the Court of Appeal of the State of California on August 24, 1987. See Appendix C. This Jurisdictional Statement is timely filed within 90 days of denial of the Petition for Review. Because the judgment of the California Court of Appeal upheld a state statute over federal constitutional challenge, this Court has jurisdiction of this appeal pursuant to 28 U.S.C. section 1257(2).[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution, Section 1, provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...."

California Civil Code section 3333.2 provides, in pertinent part:

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[2] In accord with Supreme Court Rule 28.4(c), appellant notes that 28 U.S.C. section 2403(b) may be applicable.

"(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages.

(b) *In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000.)*" Emphasis added.

STATEMENT OF THE CASE

Appellant Cassandra Green, a young, self-sufficient mother of five, entered the hospital for simple elective surgery in August, 1977. Dr. Aram Franklin, appellee, was her anesthesiologist. His negligent administration of various drugs and failure to assure a free air passage caused appellant permanent brain damage and rendered her a quadriplegic.

Appellant's civil action resulted in a judgment in her favor and a jury award of damages of $2,818,238 for future medical care; $349,000 for future lost wages; and $2,332,762 for pain and suffering. Appellee moved to reduce the pain and suffering award to $250,000 pursuant to California Civil Code section 3333.2. That motion was denied by the trial court, which held section 3333.2 unconstitutional on due process and equal protection grounds.

Franklin then appealed to the Court of Appeal. He conceded his liabiiity and did not challenge the sufficiency of the evidence to support the judgment. After the appeal was filed in the Court of Appeal, the California

Supreme Court issued its opinion in *Fein v. Permanente Medical Group*, 38 Cal.3d 137 (1985) upholding section 3333.2 as against various constitutional challenges.

On appeal, Franklin relied on the California Supreme Court's opinion in *Fein*. Appellant argued in support of the trial court's ruling that the mandatory reduction provision of Civil Code section 3333.2 was a taking without just compensation of her jury award for damages, and was thus prohibited by the Fifth Amendment. Appellant's argument was rejected by the Court of Appeal, which felt bound by the California Supreme Court's opinions in *Fein* and in an earlier case, *American Bank & Trust Co. v. Community Hospital*, 36 Cal.3d 359 (1984), even though neither case had addressed or decided the taking question.

After the Court of Appeal issued its opinion reversing the judgment and ordering the trial court to apply the mandatory reduction provisions to the award for noneconomic damages, appellant sought review in the California Supreme Court urging again that the mandatory reduction of the noneconomic damage award was a taking of her property for public use, for which the State had failed to provide any just compensation. By Order dated July 16, 1987, the California Supreme Court denied appellant's Petition for Review, making the judgment of the Court of Appeal final. In that the trial court must now comply with the Court of Appeal's order and reduce appellant's pain and suffering award to ten percent of the sum the jury deemed appropriate, this case presents an issue of federal constitutional law which "will survive regardless of the outcome of future state-court proceedings." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. —, 107 S.Ct. 2379, 2383 n. 3 (1987),

citing to *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 480, 95 S.Ct. 1029, 1038, 43 L.Ed.2d 329 (1975).

———o———

THE QUESTION IS SUBSTANTIAL

THE MANDATORY REDUCTION PROVISION IMPOSED BY CALIFORNIA TO LIMIT NONECONOMIC DAMAGES TO $250,000 SUBJECTS APPELLANT TO A TAKING OF A SUBSTANTIAL PORTION OF HER AWARDED RECOVERY WITH NO PROVISION FOR JUST COMPENSATION.

Cassandra Green, brain-damaged and a quadriplegic, brought her action for medical malpractice and after proving her case was awarded damages, part to compensate her for lost future wages and necessary lifelong medical care, and part as monetary compensation for the "pain, discomfort, fears, anxiety and other mental and emotional distress" which she has suffered as the consequence of her injury. That an injured party is entitled to compensation for such noneconomic losses is an accepted principle of our jurisprudence. That Mrs. Green was entitled to the award as found by the jury is not questioned by appellee, who never challenged the evidentiary basis of the award, but rather conceded liability. Nonetheless, Mrs. Green will be deprived of the vast bulk of the jury award for her noneconomic loss as a result of the Court of Appeal's order that the trial court apply California Civil Code section 3333.2 to reduce that award to $250,000.

Civil Code section 3333.2 is part of California's Medical Injury Compensation Reform Act of 1975 (MICRA),

a comprehensive legislative measure passed to remedy problems resulting from the "rapid increase in medical malpractice insurance premiums." *American Bank & Trust Co. v. Community Hospital, supra,* 36 Cal.3d at p. 363. The California legislature responded to the medical malpractice insurance "crisis" by enacting a series of rules for medical malpractice litigation intended to reduce the cost of medical malpractice insurance. *Id.* at p. 364, 372; *Fein v. Permanente Medical Group, supra,* 38 Cal. 3d at pp. 158-159. One such "rule", Civil Code section 3333.2, exacts a forced contribution from the most severely injured victims of medical malpractice, such as appellant, for the benefit of California's medical malpractice insurance industry. While the reduction of medical malpractice insurance premiums is a permissible legislative goal, it may not be accomplished solely at the expense of appellant or other severely injured persons. The reduction in appellant's jury awarded damages by 90 percent is a taking for which California provides no just compensation, in violation of the Fifth Amendment.

The taking issues in the instant case are not unlike those presented by *Pennell v. City of San Jose,* 55 U.S.L.W. 2167, 86-753, now pending before this Court. This Court accepted Pennell's appeal after a majority of the California's Supreme Court found no taking in a San Jose rent control ordinance. That ordinance compelled individual landlords to subsidize low income tenants by prohibiting rent increases which might cause a tenant economic hardship. In his dissent in *Pennell v. City of San Jose,* 42 Cal.3d 365, 377 (1986) Justice Mosk articulated the infirmity of the San Jose ordinance—its violation of the

Takings Clause—an infirmity also shared by Civil Code section 3333.2:

> "There is no rational link either in the benefit gained or the burden created, which would justify imposing that welfare obligation as a one-on-one subsidy, rather than spreading the imposition fairly through the class of landlords generally or taxpayers as a whole." *Pennell v. City of San Jose, supra,* 42 Cal.3d at p. 377.

Similarly, Civil Code section 3333.2 imposes upon a single class of litigants and Californians the burden of curing the medical malpractice insurance crisis.

Thus, Civil Code 3333.2 mandates a taking of Cassandra Green's property to the extent that her jury award for noneconomic losses exceeds $250,000. This is true whether her damage award in excess of the statutory maximum is viewed as coextensive with her cause of action, or as the monetary equivalent of some other form of property interest. Appellant's cause of action itself is property. *Logan v. Zimmerman Brush Company,* 455 U.S. 422, 428 (1982). Her successful maintenance of the lawsuit establishes her entitlement to a remedy. *Greyhound Food Management, Inc. v. City of Dayton,* 653 F.Supp. 1207, 1219 (S.D. Ohio 1986).

> "Some sort of remedy is one (and an important one) of the 'bundle of rights' that makes a cause of action property. In other words, a remedy is an essential part of the cause of action as that phrase is used in the Taking Clause analysis." *Id.*, citing *Lynch v. United States,* 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934).

In medical malpractice, as in other torts, "mental suffering frequently constitutes the principal element"

of damages. *Capelouto v. Kaiser Foundation Hospitals,* 7 Cal.3d 889, 893 (1972). As has been recognized in a long line of California cases, the failure to compensate for pain and suffering may make an award inadequate as a matter of law. *Id.* The jury awarded damages for pain and suffering, intending to compensate Mrs. Green for the grievous loss to her life. The mandatory reduction of that award by some two million dollars is a taking of property, as it deprives appellant of a substantial portion of the remedy to which she is entitled.

As this Court's decisions interpreting the Takings Clause make clear, the "provision does not prohibit the taking of private property but rather places a condition on the exercise of that power." *First English Evangelical Church v. Los Angeles County, supra,* — U.S. —, 107 S.Ct. at p. 2385. In evaluating governmental takings under the Fifth Amendment, this Court has "'eschewed the development of any set formula'" but rather has relied upon "'factual inquiries into the circumstances of each particular case.'" *Bowen v, Gilliard,* 483 U.S. —, 107 S.Ct. 3008, 3020 (1987), quoting from *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 224, 106 S.Ct. 1018, 1026 (1986). The facts of appellant's case are clear: In its effort to solve the medical malpractice insurance problem, California has required a severely injured woman to dedicate her rightful property to the insurance industry in furtherance of the public good. This result directly contravenes the Fifth Amendment's guarantee which "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960); *Webb's*

Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980).

That appellant's claim is cognizable as a taking finds additional support in Justice Powell's pronouncement that government policy which abolishes a litigant's civil remedy requires the payment of just compensation.

> "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Dames & Moore v. Regan*, 453 U.S. 654, 691 (1981), opinion of Justice Powell, concurring and dissenting in part.

Interpreting that language, at least one circuit has held that the Warsaw Convention's $75,000 liability limit on damages for personal injury or death on an international flight could constitute a taking under the Fifth Amendment requiring just compensation. *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1310 (9th Cir. 1982).[3] Raising the issue *sua sponte*, the Court of Appeals noted that plaintiffs' wrongful death claims were "property" within the meaning of the Just Compensation Clause of the Fifth Amendment, observing:

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[3] The Court of Appeals, in deciding the taking issue in *In re Aircrash in Bali*, criticized the California court's holding in *Agins v. City of Tiburon*, 24 Cal.3d 266, 273 (1979), affirmed on other grounds, 447 U.S. 255 (1980) as inconsistent with United States Supreme Court authority, and assumed, contrary to *Agins*, "that the excessive exercise of the government's lawmaking power may constitute a 'taking' under the fifth amendment, for which just compensation must be paid." (*In re Aircrash in Bali, supra*, 684 F.2d at p. 1311, fn. 7.) Thus, the taking analysis in *In re Aircrash in Bali*, is consistent with this Court's own recent rejection of *Agins*. (See *First English Evangelical Church v. Los Angeles County, supra*, 107 S.Ct. 2379, 2387.)

> "There is no question that claims for compensation are property interests that cannot be taken for public use without compensation. [Citations.] We can see no reason why these plaintiffs' claims are any different for fifth amendment purposes, from the claims of various creditors against the government of Iran. See *Dames & Moore. . . .*" *Id.;* see also, E-Systems, *Inc. v. United States,* 2 Cl. Ct. 271 (1983) rejecting the government's argument on summary judgment that the operation of an executive order to restrict the enforcement of liens on aircraft owned by Iran was not a taking; but see *Shanghai Power Company v. United States,* 4 Cl. Ct. 237 (1983), affirmed 765 F.2d 159, *cert. denied,* 106 S.Ct. 279.

As these authorities illustrate, government action even in furtherance of national goals of singular importance cannot be pursued at private expense; the principle is the same whether a private individual must contribute property in his possession or forfeit the right to compensation for a loss or injury.

This Court, in a series of recent cases, has held the Fifth Amendment's protection against taking without just compensation to preclude a wide variety of government invasions of diverse property interests. Thus, a landlord cannot be required to have cable television apparatus installed on the roof of her rental property (*Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164 (1982)); a couple cannot be required to grant public access across their beachfront property as a condition of rebuilding the family home (*Nollan v. California Coastal Commission,* — U.S. —, 107 S.Ct. 3141 (1987)); and the federal government cannot by legislation alter the devisement rights of Sioux Indians (*Hodel v. Irving,* 481 U.S. —, 107 S.Ct. 2076 (1987))—at least without just compen-

sation. In *Hodel*, this Court described as dubious the likelihood that there were any "investment-backed expectations" in devising the very small interests in real property held by the decedents. Moreover, the monetary deprivations suffered by the estates as the result of the legislative change amounted to as little as one hundred dollars. Nonetheless, the total abrogation of the right to devise an interest in property to one's heirs was a taking under the Fifth Amendment. Balanced against this incorporeal right, the obvious tribal benefit in preventing the ownership of parcels from being devised into increasingly meaningless fractions was still insufficient to protect the legislation from constitutional challenge as a taking requiring just compensation.

Such a taking also results when California requires a single litigant to contribute over two million dollars for the benefit of the arguably flagging insurance industry. Appellant's loss is neither illusory nor *de minimis*. Surely a state law which mandated that insurance companies be allowed to directly invade the bank accounts of malpractice victims would violate the Takings Clause. This Court has held that an invasion of real property, no matter how minimal, is always a taking requiring just compensation. *Loretto v. Teleprompter Manhattan CATV Corp., supra,* 458 U.S. 419, 102 S.Ct. 3164, 3179. An uncompensated invasion of personal property, like that effected by section 3333.2, is no less intrusive and equally constitutionally infirm.

This case has wide implications for a variety of personal property takings which state governments might well require. An individual landlord should not have to accept less than fair rent because a tenant is unable to pay more.

A clothing manufacturer should not be required to donate clothing to the needy, nor a grocer compelled to give food to the hungry, each at his own expense. If society deems it necessary and desirable to provide food, clothing and shelter to its citizens, it must do so by shouldering the obligation *as a society,* not by foisting the cost upon insular private parties. Yet section 3333.2 is equivalent to a statute mandating a grocer to give free food to any needy person who asks for it. If, as seems obvious, such a statute would constitute an unlawful taking without just compensation, this is equally true of requiring Cassandra Green to contribute over two million dollars, not to the needy, but to the California insurance industry. If that industry requires public subsidy, the public, and not the severely injured victims of medical malpractice such as Cassandra Green, must shoulder that expense.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

CASSANDRA GREEN,	)	
	)	No. B002436
Plaintiff and Respondent,	)	(SuperCt.No.
	)	C247224)
v.	)	
	)	
ARAM FRANKLIN, M.D.,	)	(Filed
	)	MAR 12, 1987)
Defendant and Appellant.	)	

APPEAL from a judgment and order of the Superior Court of Los Angeles County. Robert C. Nye, Judge.

Bonne, Jones, Bridges, Mueller & O'Keefe; Horvitz & Levy, Ellis J. Horvitz, S. Thomas Todd and Stuart B. Esner, for Defendant and Appellant.

Law Offices of David H. Greenberg; Ritter & Ritter, Inc., and Minton Ritter, for Plaintiff and Respondent.

In this action for medical malpractice, defendant Aram Franklin, M.D. appeals from a judgment entered upon a jury verdict in the amount of $5 million in favor of plaintiff Cassandra Green. We reverse and remand.

The issues raised by this appeal focus solely on the damage award and the constitutionality and applicability of various portions of the Medical Injury Compensation Reform Act of 1975 (MICRA). Since defendant concedes liability and does not challenge the sufficiency of the evi-

dence to support the judgment, we need only briefly summarize the facts giving rise to the underlying litigation.

On August 12, 1977, plaintiff, then 37 years old and the mother of five children, entered Temple Hospital for elective gynecological surgery to reopen her blocked fallopian tubes. Defendant was the anesthesiologist during that procedure. As a result of certain events that transpired in connection with the operation, plaintiff suffered both respiratory and cardiac arrest. She sustained permanent brain damage and was rendered a quadriplegic.

Plaintiff commenced this malpractice action against defendant, Dr. LeRoy Weekes, her personal physician, and Temple Hospital in July 1978. In his answer to the complaint, defendant denied liability and asserted as affirmative defenses Civil Code section 3333.1 and 3333.2 and Code of Civil Procedure section 667.7.[1] In March 1982, plaintiff served all defendants with an offer to compromise

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1. Civil Code section 3333.1 allows, in a personal injury action against a health care provider, evidence of plaintiff's collateral benefits received as a result of the injuries.

Civil Code section 3333.2 places a ceiling of $250,000 on noneconomic losses recoverable in an action for injury against a health care provider based on professional negligence.

Code of Civil Procedure section 667.7 provides that when a plaintiff in a medical malpractice action has sustained "future damages" of $50,000 or more, compensation for those damages is to be paid periodically over the course of time the plaintiff incurs the losses, rather than in a lump-sum payment at the time of judgment.

All three provisions were enacted as part of the Medical Injury Compensation Reform Act of 1975. (Stats. 1975, Second Ex. Sess. 1975-1976, chs. 1, 2, pp. 3949-4007; see discussion, *infra*.)

for $1 million pursuant to Code of Civil Procedure section 998. Defendants refused. Another statutory offer, this time for $4 million, was tendered in January 1983. Defendants again refused. Immediately prior to trial, however, Temple Hospital settled with plaintiff for $500,000.

Following the close of plaintiff's case-in-chief, defendant requested the court to apply MICRA by reducing any award of noneconomic damages to $250,000 (Civ. Code, § 3333.2), ordering periodic payment of future damages in excess of $50,000 (Code Civ. Proc., § 667.7), limiting plaintiff's attorneys' fees to the amounts specified in Business and Professions Code section 6146, and by submitting special interrogatories to the jury on the issue of damages. Plaintiff, of course, opposed the motion, and the trial court, after the parties had rested, ruled that the various provisions of MICRA sought to be applied were unconstitutional.[2] The court did find, however, that it would be appropriate to submit special interrogatories to the jury should defendants be found liable.

The jury ultimately returned a verdict in favor of Dr. Weekes, and a unanimous general verdict against defendant for $5.5 million. Pursuant to defendant's request, the court then submitted, and the jury answered the following special interrogatories: "1. What amount of the verdict is for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered by the plain-

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2. Although defendant's acts of professional negligence occurred after the effective date of MICRA, the various provisions of the Act sought to be applied here were not found to be constitutional by our Supreme Court until sometime after trial had concluded. (See discussion, *infra*.)

tiff as a result of the injury in question? Answer: $2,332,-762; 2. What amount of the verdict, if any, represents future lost wages? Answer: $349,000; 3. What amount of the verdict represents future medical expenses, including hospital and nursing care, services and supplies and costs of future care and custody? Answer: $2,818,238." Judgment on the verdict was thereafter entered, then later amended nunc pro tunc to reduce it to $5 million, reflecting the $500,000 settlement with Temple Hospital.

Defendant's subsequent motions to vacate the judgment and for new trial were denied. Following the filing of plaintiff's amended cost bill for $354,295, which included $311,917 as prejudgment interest, defendant moved to tax. The trial court eventually allowed plaintiff costs in the amount of $345,903. This appeal followed.[3]

Citing to a series of recent California Supreme Court cases which have upheld various portions of MICRA, defendant contends that we must reverse plaintiff's award and remand the matter to the trial court with directions to apportion damages in accordance with the applicable portions of the Act. After raising several procedural bars to any such reversal, plaintiff argues that MICRA remains unconstitutional despite the rulings of the Supreme Court and that, in any event, defendant's formula for reducing the judgment is fundamentally flawed. Before proceeding to a discussion of these and other issues raised by this appeal, we think it important to briefly review the history and purpose of the MICRA legislation.

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3. Defendant appeals from both the judgment on the verdict and the trial court's order denying in part his motion to tax costs. Plaintiff has abandoned a cross-appeal from the judgment in favor of Dr. Weekes.

In May 1975, responding to what came to be popularly described as "the medical malpractice crisis," the Governor issued a proclamation convening the Legislature in extraordinary session. The proclamation declared that medical malpractice insurance rates had risen to levels which many doctors found intolerable, that the inability of doctors to obtain such insurance at reasonable cost was endangering the health of the people and threatened the closing of many hospitals, and that the long term consequences of such closing could seriously limit the health care provided to hundreds of thousands of Californians. (Governor's Proclamation to Leg. (May 16, 1975) Stats. 1975, Second Ex. Sess. 1975-1976, p. 3947.)

The proclamation went on to state that only "sacrifice and fundamental reform" would provide a lasting solution. "It is critical," the Governor concluded, "that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums."

The Legislature responded by enacting MICRA, a sweeping statute that enacted, amended, or repealed several sections of the Business and Professions Code, the Civil Code, the Code of Civil Procedure, and the Insurance Code.[4] In the area of medical malpractice litigation,

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4. The preamble to MICRA states, in part: "The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically

(Continued on following page)

MICRA directed its attention to four basic concerns: time limitations, damages, attorney's fees, and arbitration. With respect to limitations of time MICRA established a special statute of limitations for actions against health care providers (Code Civ. Proc., §§ 364, 365). Regarding damages in such actions, it imposed a ceiling of $250,000 on the amount recoverable for "noneconomic losses" (Civ. Code, § 3333.2), permitted "collateral source" evidence while precluding subrogation (*id.*, § 3333.1), and introduced a system of periodic payment for "future damages" in excess of $50,000 (Code Civ. Proc., § 667.7). Limitations were placed on attorney's contingency fee contracts (Bus. & Prof. Code, § 6146) and language was prescribed for arbitration clauses in agreements for medical services (Code Civ. Proc., § 1295).

In the years that have followed its enactment, various provisions of MICRA have withstood constitutional challenges. In *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 364, the court held that the statute requiring periodic payment of "future damages" did not violate either the state or federal due process or equal protection clauses since it was rationally related to a legitimate state interest (i.e., the reduction of medical malpractice insurance costs).

(Continued from previous page)

indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police powers, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health and safety considerations permit now and into the foreseeable future." (Stats. 1975, Second Ex. Sess. 1975-1976, ch. 2, § 12.5, p. 4007.)

Similarly, in *Barme v. Wood* (1984) 37 Cal.3d 174, 180, the court found that MICRA's provision which prohibits "collateral sources" from obtaining reimbursement from medical malpractice defendants or their insurers (Civ. Code, § 3333.1, subd. (b)) did not violate the due process or equal protection clauses since it was rationally related to reducing the cost of malpractice insurance.

In *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920, 931-932, the court concluded that section 6146 of the Business and Professions Code, limiting the amount of fees an attorney may collect when representing a plaintiff in a medical malpractice action on a contingency basis, was constitutionally related to the legislation's legitimate objective and therefore did not run afoul of the due process or equal protection clauses.

More recently, in *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 158-159, the court rejected due process and equal protection challenges to those sections of MICRA which limit damages for noneconomic losses to $250,000 (Civ. Code, § 3333.2, subd. (b)) and permit a defendant to introduce evidence of benefits a plaintiff has received from a collateral source. (Civ. Code, § 3333.1, subd. (a).)

Based upon the foregoing, defendant of course contends that the trial court's refusal to apply MICRA constitutes reversible error per se. Although plaintiff recognizes that the Act has survived the constitutional challenges discussed above, she asserts that the Supreme Court's rulings were wrongly decided and must be reconsidered, especially in light of several "new" equal protection and due process arguments advanced for the first time on this appeal. Plaintiff therefore urges us to affirm the judg-

ment. The doctrine of stare decisis compels us, however, to reject plaintiff's position.

No rule of law is more firmly established than that which holds that decisions of the Supreme Court which have not been reversed or modified are binding on all inferior state courts and must be applied whenever the facts of a case are not fairly distinguishable from those in which the high court has declared the applicable principles of law. (*People v. Triggs* (1973) 8 Cal.3d 884, 890-891; overruled on other grounds in *People v. Lilienthal* (1978) 22 Cal.3d 891, 896; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Nix v. Performed Line Products Co.* (1985) 170 Cal.App.3d 975, 981.) Plaintiff has cited no case, nor has our independent research revealed any, in which an intermediate court properly departed from a prior and controlling holding of the Supreme Court, although the Supreme Court may, of course, depart from a previous holding of its own. (*People v. Savala* (1981) 116 Cal.App.3d 41, 58.) Although appellate courts have avoided the precedential confinement of stare decisis by determining that otherwise controlling language of a prior Supreme Court decision was either dicta or otherwise distinguishable (see e.g., *Montandon v. Triangle Publications, Inc.* (1975) 45 Cal.App.3d 938, 950-951; *People v. Gregg* (1970) 5 Cal.App.3d 502, 505-507; *Childers v. Childers* (1946) 74 Cal.App.2d 56, 61), neither *American Bank, Barme, Roa,* nor *Fein* admit to such fine distinctions. Each of those decisions unequivocally found that the challenged portions of MICRA pass constitutional muster, and nothing in the instant case compels a contrary conclusion.

Anticipating that we would summarily reject any attack upon the Supreme Court's prior holdings, plaintiff

has fashioned a variety of constitutional arguments that she claims have never previously been considered. Most of these challenges are focused on the unconstitutionality of certain purported classifications created by the Act. Plaintiff thus asserts that Civil Code section 3333.2 must fall before the equal protection and due process clauses because it creates a fixed dollar limitation on noneconomic damages without any possibility of adjustment to reflect changes in the value of money over time and, more importantly, because it improperly discriminates between medical malpractice victims who sue in their own right and those who, as heirs of such victims, initiate wrongful death actions. She further maintains that the statutorily imposed limit on general damages effectuates an unconstitutional taking without just compensation. Plaintiff finally claims that both Civil Code section 3333.2 and Code of Civil Procedure section 667.7 must be struck down because the "crisis" pursuant to which MICRA was enacted no longer exists.

Each of the foregoing arguments merely echo, albeit in a somewhat different fashion, the constitutional challenges advanced and rejected in *American Bank* and *Fein*. As we have discussed, *supra,* the Supreme Court has specifically found that MICRA's fixed dollar limitation on noneconomic damages and its creation of a system of periodic payments for future damages violate neither the equal protection nor due process clauses because the classifications created by both provisions are rationally related to the goal of reducing the cost of medical malpractice insurance rates. No matter how plaintiff seeks to frame her attack, we are bound by this determination. Although we think it clear that the arguments raised on this appeal have

been definitively answered by our Supreme Court, we have chosen to address plaintiff's contentions in order to dispel any lingering doubt that MICRA passes constitutional muster.

Contrary to plaintiff's assertion, Civil Code section 3333.2 creates no distinction between alleged victims of medical malpractice and those survivors who initiate wrongful death actions. Both the language of the statute and its legislative history establish that the limitation on noneconomic damages applies equally to both classes of litigants.[5] Subdivision (a) specifically declares that the section is applicable "[i]n *any action* for injury against a health care provider *based on professional negligence. . . .*" (Emphasis added.) Subdivision (c)(2) further states that "[p]rofessional negligence" includes "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury *or wrongful death. . . .*" (Emphasis added.) Despite the clear wording of the statute plaintiff maintains that the section has no applicabil-

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5. In examining Civil Code section 3333.2, we apply the fundamental rule "that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.] In determining such intent '[t]he court turns first to the words themselves for the answer.' [Citation.] We are required to give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.' [Citations.] 'If possible, significance should be given to every word, phrase, sentence and a part of an act in pursuance of the legislative purpose.' [Citation]; 'a construction making some words surplusage is to be avoided.' [Citation.] 'When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.' [Citations.]" (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230.)

ity to wrongful death actions because subdivision (a) refers to "any action for injury" rather than "any action for injury or wrongful death." This argument ignores the fact that wrongful death actions do constitute actions for injuries suffered by the heirs of medical malpractice victims. (See *Krouse v. Graham* (1977) 19 Cal.3d 59, 68.)

The legislative history of Civil Code section 3333.2 provides further evidence of its applicability to wrongful death actions. As initially drafted, a proposed section 21153, subdivision (g) of the Health and Safety Code would have limited the recovery of noneconomic damages by providing that in actions against health care providers, "[c]ompensation awarded for injury" would include "all noneconomic loss, including pain, suffering, inconvenience, physical impairment, and other nonpecuniary damage which would have been recoverable under the law but for the enactment of this division, up to a limit of eight hundred dollars ($800) per month." Compensation for survivors was separately provided for in proposed section 21154 of the Health and Safety Code, which stated in pertinent part: "Compensation awarded survivors pursuant to this chapter shall include and be limited to the following: (a) Loss of income of the deceased. . . . (b) All appropriate and reasonable expenses necessarily incurred by a survivor after a patient's death. . . . (c) All noneconomic damages which would have been recoverable by the survivors under the law but for the enactment of this division." As can be seen, this original draft did create a distinction between classes of litigants and would have permitted plaintiffs in wrongful death actions to recover more noneconomic damages than actual victims of medical malpractice. The distinction, however, was short lived.

The proposed additions to the Health and Safety Code eventually were deleted and reintroduced as Civil Code sections 3333.2 and 3333.3. The former section simply stated that in "no action" based upon the "professional negligence of a provider of health care services" would the "amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)." The latter statute, however, merely tracked the language of proposed Health and Safety section 21154 and thus carried over the distinction between victims and survivors. Following several weeks of debate, the Legislature rejected the proposed changes and enacted a revised version of Civil Code section 3333.2 which read in prtinent part: "(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage. [¶] (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)."[6]

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6. The purpose of Civil Code section 3333.2, along with other provisions of the MICRA legislation, was explained in the Legislative Counsel's Digest as follows: "(1) Under existing law persons injured by healing arts practitioners, health facilities, or others involved in the rendition of health services, and certain survivors of a person killed by the wrongful or negligent act of such a health care provider, may seek redress through civil actions in the courts. No limitations are imposed upon the damages which may be recovered for such an injury or death or upon attorney fees for attorneys of plaintiffs in such actions. [¶] . . . [¶] The bill would limit the amount and type of damages which could be recovered in an action based on medical malpractice."

We agree with defendant that by deleting Civil Code section 3333.3 and broadening the language of section 3333.2 the Legislature expressly intended that the imposed limit on general damages be applicable to all actions against health care providers based on professional negligence, including those for wrongful death. Any remaining ambiguity was eliminated in 1985 when the definition of "professional negligence" was amended to specifically encompass any act of malpractice which is the "proximate cause of a personal injury or wrongful death."[7]

As we see it, the justification for limiting noneconomic damages to $250,000 applies equally to those who initiate suit as direct victims of medical malpractice and those who litigate as survivors of such persons. If wrongful death

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7. As noted, Civil Code section 3333.2, subdivision (a) provides that an injured plaintiff shall be entitled to recover noneconomic damages to compensate for "pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage." Relying upon selected language from *Krouse v. Graham, supra,* 19 Cal.3d 59, 67-69, wherein the court held that heirs may recover for loss of consortium but not "grievance and sorrow," plaintiff contends that since each of the specifically enumerated types of damages are applicable solely to living patients who sue health care providers, and not to survivors, the Legislature intended that wrongful death actions be excluded from the reach of the statute. We disagree. Subdivision (a) in no way purports to contain a comprehensive listing of all types of noneconomic losses which may arise in malpractice litigation. Moreover, as the court emphasized in *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 527, "The amount of damages awarded in a wrongful death case designed to compensate these noneconomic losses [loss of comfort, society, companionship, care and protection] . . . [is] akin to those awarded for pain and suffering and emotional distress. . . ." For similar reasons, we also reject plaintiff's argument that Civil Code section 3333.2 is inapplicable to wrongful death actions because nonpecuniary damages are not recoverable in such cases. (See *Krouse v. Graham, supra,* 19 Cal.3d 59, 67-70.)

actions were exempted from the provisions of Civil Code section 3333.2, the legislative goal of reducing and stabilizing insurance costs by limiting the size of damage awards would be seriously, if not fatally, impaired. (See *Fein v. Permanente Medical Group, supra,* 38 Cal.3d 137, 163.)

Plaintiff's argument that Civil Code section 3333.2 is constitutionally infirm because it does not require indexing of the $250,000 limit to reflect inflation and because it effectuates a taking without just compensation is premised on the notion that she, along with all other victims of medical malpractice, are entitled to a particular measure of damages. That claim was laid to rest by the Supreme Court when it held that a plaintiff has no constitutional property right or interest in the manner damages may be awarded, and that the Legislature possesses "broad control over *the measure,* as well as *the timing,* of damages" and "may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest." (*Fein, supra,* at p. 158; emphasis in original; *American Bank & Trust Co. v. Community Hospital, supra,* 36 Cal.3d 359, 368-369.) Consistent with this conclusion was the court's further determination that when the Legislature decreased the measure of recovery for noneconomic damages, it was not required to compensate plaintiffs for any loss reduction occasioned thereby by providing them with a quid pro quo. (*Fein, supra,* at p. 157.) In light of these principles, plaintiff's contentions are meritless.

Asserting that the medical malpractice crisis no longer "exists," plaintiff would next have us conclude that MICRA has served its purpose and must now be declared unconstitutional. Needless to say, the constitutionality of

any enactment cannot and does not depend upon the judiciary's assessment of whether the necessity for the measure still remains. (See *American Bank, supra,* 36 Cal.3d 359, 374.) When the Legislature has determined that a need for legislation exists, it is also for the Legislature to determine whether the need has passed and the legislation should be repealed. Plaintiff's argument must, therefore, be addressed to that body and not the courts.

Departing from her equal protection and due process challenges, plaintiff finally contends that Civil Code section 3333.2 was impliedly repealed by the passage of the Fair Responsibility Act of 1986, Civil Code section 1431 et seq., and thus cannot be applied to the facts of this case. Adopted as an initiative measure (Proposition 51) in June 1986, the Act essentially abolished the principle of joint and several tort liability for nonpecuniary injury[8] in order

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8. Civil Code section 1431.2, the operative section of the Act, provides: "(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount. [¶] (b)(1) For purposes of this section, the term 'economic damages' means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities. [¶] (2) For the purposes of this section, the term 'non-economic damages' means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation."

that "defendants in tort actions shall be held financially liable in closer proportion to their degree of fault." (Civ. Code, § 1431.1, subd. (c).) Citing to this language, plaintiff maintains that MICRA's limit on noneconomic damages is fundamentally inconsistent with the goal of the new law. We see no such inconsistency.

In a manner similar to that expressed in MICRA, the very wording of Proposition 51 evidences a legislative wish to curtail personal injury recoveries against defendants not primarily to blame for plaintiffs' injuries; to reduce the financial burden of injury claims on those defendants and on their liability carriers; and to confer a financial benefit on the public at large, who, the statute declares, "ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums," and suffer a resulting reduction in essential government and nongovernment services. The enactment seeks to accomplish these aims, very wisely we think, by preventing a defendant from being liable for more than his proportionate share of noneconomic damages. Civil Code section 3333.2, on the other hand, attempts to reduce the cost of medical malpractice insurance by setting a specific dollar limit on nonpecuniary damages. The statutes thus complement one another and go far in bringing about needed tort reform.

Considered in this light, the fact that Proposition 51 fails to set forth any limits that would be applicable to malpractice actions against health care providers is of no moment. We must presume, of course, that both the drafters of the initiative measure and the people in voting to enact it were aware of MICRA, its objectives, and its limits on recovery of damages. For these reasons we think

it clear why nothing in the new law even remotely suggests that noneconomic damages cannot be limited in any given context. We can only conclude that Proposition 51 was never intended to eliminate the provisions of Civil Code section 3333.2 or MICRA as a whole.[9]

Having determined that the foregoing constitutional challenges must fail, we next consider plaintiff's contention that the damage award must be affirmed because during the course of trial defendant, in one way or another, waived his right to invoke either Civil Code section 3333.2 or Code of Civil Procedure section 667.7. Her arguments in this regard begin with the disingenuous assertion that defendant, having introduced no evidence tending to establish that he carried malpractice insurance, was not entitled to the benefits of the MICRA statutes. MICRA, however, applies to licensed "health care provider[s]" (Civ. Code, § 3333.2, subd. (c)(1)) in general and imposes no requirement that a member of that class be insured before the Act may be invoked in any particular instance. If the opposite were true, the entire statutory scheme would be vulnerable to equal protection challenges by those defendants who, for whatever reason,

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9. In reaching our conclusion we apply the long settled rule that "the law shuns repeals by implication, particularly where . . . 'the prior act has been generally understood and acted upon.' (*Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176.) [¶] So strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, 'In order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.' (*Ibid.*)" (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868.)

could not afford malpractice insurance. The Legislature clearly never intended such a result.[10]

Plaintiff further claims that defendant waived any right to reduction of the noneconomic portion of the award because he untimely asserted the provisions of Civil Code section 3333.2 and failed to request a jury instruction limiting general damages to $250,000.

The argument that defendant somehow waived the statute's prohibition against noneconomic losses in excess of $250,000 needs little discussion. As previously noted, defendant's answer to plaintiff's complaint asserted Civil Code section 3333.2 as an affirmative defense, thus giving notice to all parties that he intended to invoke MICRA at trial. Moreover, the applicability of the Act to the instant case was in controversy throughout the proceedings and at no time was plaintiff "left in the dark" as to defendant's position. Although trial briefs arguing the issue were not filed until after plaintiff had rested, we fail to see how she may have suffered any prejudice therefrom. The trial court, of course, ruled in her favor and the matter swiftly proceeded to judgment. Under the circumstances, there simply was no waiver.

Plaintiff's contention that defendant, having failed to request a jury instruction or verdict form explaining the $250,000 limit, may not now have the damage award reduced is equally unavailing. At bottom, the argument

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10. Even were we to find that proof of insurance coverage was somehow necessary before MICRA could be invoked, plaintiff, having failed to raise the issue in the trial court, would be precluded from arguing the issue on this appeal. (See *People v. Merriam* (1967) 66 Cal.2d 390, 396-397.)

misconceives the duties of both the court and jury in a medical malpractice action tried under MICRA. While the jury possesses the ultimate responsibility for computing the measure of damages which flow from a particular act of negligence, it is for the trial court to determine the actual amount of the judgment to be entered by giving effect to rules which may increase or decrease the verdict as rendered. (See *Marshall v. Brown* (1983) 141 Cal.App. 3d 408, 418.) From our reading of Civil Code section 3333.2, we think it obvious the Legislature never intended a jury be informed of the limitations imposed by the statute or that it consider such limitations in assessing damages. First, and perhaps most importantly, the fact that an award will be reduced if it exceeds $250,000 is irrelevant to the jury's function of calculating the dollar amount of a plaintiff's injury. Second, an instruction based on the terms of the statute would only serve to increase the possibility that a jury may simply label damages that otherwise would have been denominated noneconomic as economic losses. Moreover, in those instances where a plaintiff's noneconomic loss is relatively small jurors, told of the $250,000 limit, may feel compelled to award the maximum where they otherwise would have awarded less. The Legislature's intent in limiting damages in medical malpractice litigation would be frustrated in either event. To avoid such results, the reduction of an award for noneconomic loss must be accomplished by the court as a matter of law without interference from the jury. Such a practice insures that neither party will be prejudiced by a potentially misleading instruction.

Based upon the foregoing, the trial court, upon remand of the instant case, must reduce the damage award

for noneconomic loss to $250,000 in a manner which we will discuss, *infra*.

We further reject the argument that defendant's request for periodic payment of future damages was either untimely or insufficient. Although plaintiff acknowledges that defendant asserted Code of Civil Procedure section 667.7 as an affirmative defense in his answer, she contends that his election to have the statute applied, coming after the presentation of her case, deprived her of the right to offer "appropriate proof" of future damages. Plaintiff's claim of prejudice is premised on the assumption that had defendant sought periodicizing at the commencement of trial, her economist would have been able to calculate future damages in terms of future dollars by taking into consideration inflation and the attendant increased costs of health care.[11] Believing however, that defendant would not seek an order requiring periodic payments and that any award would be paid in a lump sum, plaintiff's expert discounted damages to their present cash value. The error was compounded, she asserts, when defendant requested an instruction (BAJI No. 14.70) directing the jury to reduce future pecuniary loss to its present cash value. Based upon the foregoing, plaintiff concludes that defendant waived his statutory right to periodic payments and that she is therefore entitled to retain the lump-sum award.

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11. We hasten to point out that plaintiff's argument in this regard presupposes that had defendant requested an order for periodic payments before trial commenced, the court would have ruled differently on the constitutionality of Code of Civil Procedure section 667.7, thus compelling her to produce additional evidence on the issue of future damages. Nothing in the record supports such speculation.

Even were we to assume that plaintiff proceeded to trial under the erroneous belief that defendant would not request periodic payment of future damages,[12] nothing prevented her from reopening her case after defendant made his election pursuant to Code of Civil Procedure section 667.7. Plaintiff chose, however, to challenge the constitutionality of the statute. When the court ruled in her favor, there was, of course, no need for her to introduce additional evidence on the issue of future damages. In essence, plaintiff is now claiming that defendant waived a right the court found did not exist. The fallacy of her reasoning is, to say the least, self evident. Under the circumstances, plaintiff may not complain that she was somehow prejudiced by defendant's failure to make an earlier, and perhaps more timely, election.

We also find no merit to the argument that defendant waived his statutory rights by requesting that the jury be directed to reduce future damages to their present cash value.[13] Such an instruction is generally required where

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12. We find this "assumption" difficult to accept in light of the fact that defendant's answer put plaintiff on notice that periodic payment of future damages would be sought at time of trial.

13. Using a slightly modified version of BAJI No. 14.70, the trial court instructed the jury as follows:

"Any award for pecuniary loss must be only for its present cash value.

"Present cash value is the present sum of money which, together with the investment return thereon when invested so as to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the

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a future pecuniary loss is involved in order to prevent a jury from awarding excessive compensatory damages. (See *Canavin v. Pacific Southwest Airlines, supra,* 148 Cal.App.3d 512, 521; *Noble v. Tweedy* (1949) 90 Cal.App. 2d 738, 747; see also Carlson, *Economic Analysis v. Courtroom Controversy: The Present value of Future Earnings* (1976) 62 ABAJ 628.) Plaintiff contends, however, that where a defendant invokes the provisions of Code of Civil Procedure section 667.7, as in the instant case, the instruction impermissibly results in a "double discount" of the judgment by reducing future damages to their present value and then deferring payments over the period of a plaintiff's expected lifespan. She thus concludes that the instruction may be given only in those instances where the judgment is to be paid in a lump sum. Noting that the award in this case already has been reduced to its present value, plaintiff maintains that if we now permit defendant to defer payment of the judgment, she will be deprived of the full recovery to which she is entitled.

Plaintiff's argument once again assumes that defendant could somehow waive a right the trial court ruled was nonexistent. Defendant had no choice but to submit the contested instruction after the court determined that Code of Civil Procedure section 667.7 was unconstitutional. With the possibility of a lump-sum judgment loom-

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times, in the amounts, and for the period that you find such future benefits would have been received.

"The present cash value will, of course, be less than the amount you find to be the loss of such future benefits."

ing on the horizon, the burden fell on defendant to have any award for future damages reduced to its present value.[14] Viewed in this light, the instruction given was a correct statement of the law and in no way prevents defendant from arguing that he is entitled to have the judgment periodicized upon remand. (See *Masterson v. Pig'n Whistle Corp.* (1958) 161 Cal.App.2d 323, 336.)

Having concluded that there was no waiver of defendant's right to assert Code of Civil Procedure section 667.7, we next discuss the interplay between a statutory demand for periodic payments, the reduction of future damages to their present cash value, and the jury instructions relating thereto.

While the "use note" to BAJI No. 14.70 commands that jurors be directed to reduce future damages to their present cash value "in every instance where a future pecuniary loss is involved", there is a dearth of case authority explaining the purpose and application of the instruction. The rationale for such reduction apparently

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14. We recognize that there is very little direct authority, at least in this state, bearing upon the question of whether the plaintiff or defendant must assume the *burden of proof* on the issue of reducing the award to present value. Logically, since such reduction ultimately benefits the defendant, he should shoulder the burden of producing evidence on this issue. If, however, the present value of future damages is viewed as an element of compensatory damages, then the burden would rest with the plaintiff. We need not resolve the controversy on this appeal. Under the circumstances presented here, we think it appropriate to assume that, at the very least, defendant had the *burden of requesting* a present value instruction. (See *Louisville & N.R. Co. v. Holloway* (1916) 246 U.S. 525 [62 L.Ed. 867, 485 S.Ct. 379; *Alma v. Manufacturers Hanover Trust Co.* (9th Cir. 1982) 684 F.2d 622, 626; *Aldridge v. Balitimore and Ohio R. Co.* (4th Cir. 1986) 789 F.2d 1061.)

rests on the notion that a damage award, paid in one lump sum, may be invested by the plaintiff so it will eventually yield an amount equal to gross losses. "When the injured person is awarded damages for impairment of future earning capacity, future medical expenses, and future pain and suffering, it is assumed that he can invest a substantial portion of that award and realize a return on that investment until he needs the money to compensate him for future loss. If plaintiff would be permitted to recover the total sum of future losses without considering the return on an investment of that award, he would, theoretically, recover, excessive compensatory damages. . . . Future damages are, therefore, reduced to present value to prevent recovery of excessive damages, and this is for the benefit of the defendant. [Citation.]" (Johns, California Damages (3d ed. 1985) § 1.85, pp. 1-91-1-92; see also Rest. 2d Torts, § 93A, com. a.)

The manner in which future damages are reduced is no easy task. Present cash value is defined in BAJI No. 14.70 as the present sum of money which, together with the return it yields when invested so as to produce the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts, and for the period that the plaintiff would have received the benefits had he or she not been injured. The instruction therefore contemplates that the jury will receive evidence with regard to the *gross sum* of the future pecuniary loss awarded to the plaintiff and the methods by which that sum should be "discounted." Under this approach, the process of determining the "discount rate" takes on special importance. Because there is no set method for ascertaining such rates

(see *Noble v. Tweedy, supra,* 90 Cal. App.2d 738, 747-748), trial courts generally allow the parties great latitude in arguing how the reduction of an award is to be calculated. The plaintiff usually will show a larger sum of damages reduced at a lower rate of interest and for a longer period of time. The defendant, on the other hand, most often attempts to prove smaller losses reduced at a higher rate of interest for a shorter period of time.[15]

The entire reduction process presumes, of course, that compensation for anticipated losses will be set, fixed, and paid in one lump-sum award. Code of Civil Procedure section 667.7, however, eliminates the possibility of such awards in medical malpractice litigation and the concomitant need to discount future damages. When payment of the judgment is deferred over several years or decades, there is no reason to take into consideration the future earning power of the amount awarded since investment of the total sum is impossible. If a trial court was allowed to formulate a periodic payment schedule based upon a present cash value award, the resulting judgment would never fully compensate an injured party for his or her future losses. The judgment would, in effect, be discounted twice, first when damages are reduced to present value, second when payment is deferred. We think it clear that the Legislature never intended such a result when it enacted Code of Civil Procedure section 667.7.

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15. Whatever method is utilized, the discount rate must ordinarily take into account the factors that went into the determination of a plaintiff's future damages, including future inflation. (See *Jones & Laughlin Steel Corp. v. Pfeifer* (1983) 462 U.S. 523; *Aldridge v. Baltimore and Ohio R. Co., supra,* 789 F.2d 1061.)

Once a party elects to have any portion of the judgment paid periodically,[16] the jury should be instructed to return a special verdict designating the gross amount of future damages and the present cash value of the award as determined under BAJI No. 14.70.[17] The rendition of

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16. Plaintiff urges us to hold that a defendant's request for periodic payment of future damages must occur at the commencement of trial or forever be waived. Nothing in the law compels such a harsh result. In *Craven v. Crout* (1985) 163 Cal. App.3d 779, 784, the court merely concluded that a "party's request for periodic payment of future damages must be made prior to entry of any judgment in the action." Although it declined to specify at what point during trial such a motion should be made, the court did suggest that a careful defendant must ask, or indicate an intention to ask, for a periodic payment order before the case is submitted to the jury or make such a request immediately upon announcement of the verdict and couple the request with an application for a stay of judgment, in order to enable the court to ascertain or divine the breakdown of the verdict between "future damages" and other damages.

Since a defendant's request under Code of Civil Procedure section 667.7 directly affects the nature and scope of the evidence to be offered at trial on the issue of damages, we are of the view that such a request should be made, at the very least, before a plaintiff's economic experts are called to testify. This requirement imposes no undue burden on the defense and affords both parties the opportunity to submit jury instructions based upon the evidence introduced at trial. If for some reason the defendant fails to announce his intention until sometime after the experts have testified, the trial court may, of course, allow plaintiff to reopen and introduce further evidence on the issue of damages as necessary.

17. BAJI No. 16.01, which was drafted in response to the enactment of MICRA, suggests, inter alia, the following special interrogatories:

"Question No. 6(a): What amount of damage, if any, do you find plaintiff will sustain for future medical, hospital, surgical and rehabilitation care [proximately] [legally] resulting from such negligence?

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such a verdict will enable the trial court to structure a periodic payment schedule that is in keeping with the statutory objective of "provid[ing] compensation sufficient to meet the needs of an injured plaintiff . . . for whatever period is necessary." (Code Civ. Proc., § 667.7, subd. (f).)

In the case at bench, while both parties agree that the present value judgment may not be used to formulate the amount, timing, or duration of the periodic payments, they offer widely divergent approaches as to how the trial court should confront its task upon remand. Defendant proposes that the court "undo" the present value determination by referring to the evidence of future damages introduced at trial or by conducting a post-verdict hearing to clarify the present state of the record. Plaintiff counters that the suggestion is impracticable because neither party's experts testified to the gross amount of future damages or specified with any exactitude the formulas they used in arriving at the present value figures. She further argues that a post-verdict hearing would deprive her of her constitutional right to a jury trial on the issue of damages. Plaintiff therefore concludes that the only way she may be compensated for the "double discount" effected by defendant's request for periodic payments is interest on the judgment at the rate of ten percent per annum. (See Code Civ. Proc., § 685.010.)

(Continued from previous page)

"Question No. 6(b): What amount do you find to be the *present cash value* of the amount stated in answer to Question 6(a)? . . .

"Question No. 8(a): What amount of damage, if any, do you find plaintiff sustained for the loss of future earnings which are [proximately] [legally] caused by such negligence?

"Question No. 8(b): What amount do you find to be the *present cash value* of the amount indicated in response to Question 8(a)?" (Emphasis added.)

Having carefully considered each of the foregoing proposals, we are of the opinion that defendant's approach best comports with the principles and procedures discussed by the Supreme Court in *American Bank*.

Under Code of Civil Procedure section 667.7 the jury retains the ultimate authority to determine a plaintiff's "total damages." The trial court, however, is empowered to fashion the specific details of the periodic payment award, designating the dollar amount of the payments, the interval between payments, and the period of time over which the payments are to be made. (Code Civ. Proc., § 667.7, subd. (b)(1). In so doing, the court is to "be guided by the evidence of future damages introduced at trial" (*American Bank, supra,* 36 Cal.3d 359, 377) and the jury's responses to any special interrogatories submitted by the parties. (*Ibid.*) As emphasized by the court in *American Bank,* the difficulty in formulating a schedule of periodic payments will vary depending upon the complexities of any given case and the nature of the evidence presented by either the plaintiff or the defendant.

In those instances where the jury is asked to specify both the present value of damages for future losses and the total gross amount of such damages (see BAJI No. 16.01, *supra*), the trial court may readily determine a stream of payments which meets plaintiff's needs according to the evidence and is equivalent in value to the jury's gross verdict. Where the jury returns only a present value verdict, as in the instant case, the trial court will, of course, be required to consider the various elements of the present value calculation as testified to at trial. If the jury's verdict approximates the figures given by a particular

economist, the court may reasonably conclude that the jury agreed with that expert's assessment of plaintiff's future damages and use his testimony as a basis for devising a payment schedule. In those cases where, for whatever reason, that testimony is incomplete we are aware of no reason why the trial court may not conduct a post-verdict hearing and take further evidence on the relevant issues before it. These procedures deny neither party their constitutional right to a jury trial so long as the resulting judgment falls within the parameters of the verdict and the integrity of the fact finder's determination is maintained. (See *American Bank, supra,* 36 Cal.3d 359, 374-378.)

Plaintiff's argument that we may avoid the complexities of attempting to "undo" the verdict by awarding her post-judgment interest is unpersuasive. Under this approach, the trial court apparently would compute the amount of each periodic payment by dividing the jury's reduced-to-present value award by plaintiff's work life or life expectancy and adding ten percent interest on the entire amount of the unpaid judgment. We see no reason to arbitrarily use a rate of ten percent—a rate that does not necessarily comport with the evidence adduced at trial—when the record makes it clear that the jury, in arriving at the present value award, merely adopted the figures testified to by plaintiff's economist. In making his present value calculations, that expert necessarily had to work from a gross value figure. We believe that his testimony will provide sufficient guidance to the trial court in determining gross damages and in fashioning a schedule of periodic payments based thereon.

We lastly reject plaintiff's contention that defendant waived his right to seek periodic payment of future dam-

ages and the application of Civil Code section 3333.2 by failing to submit adequate special interrogatories after the jury returned its general verdict. Although those interrogatories sought to segregate the individual components of the total award, they failed to ask the jury to specify *past* medical expenses and past lost wages. We suspect that any deficiencies in this regard resulted from the absence of testimony at trial pertaining to post pecuniary losses. In any event, the interrogatories substantially comply with the dictates of *American Bank*. While plaintiff now considers the questions submitted to the jury to be misleading or incomplete, at no time during trial did she seek to amend the interrogatories or propose alternatives that would have alleviated the claimed error. It is well established that when a party complains that any particular instruction is too general, lacks clarity, or is incomplete, the compiaint must be coupled with a request for an additional or qualifying instruction in order to have the error reviewed on appeal. (*Townsend v. Butterfield* (1914) 168 Cal. 564, 569; *Delia S. v. Torres* (1982) 134 Cal.App.3d 471, 481.) The absence of any such request in the record before us makes it unnecessary to explore the issue in any greater detail.

Having concluded that plaintiff's constitutional and procedural challenges are without merit and that the damage award must be reversed, we devote the remaining portion of this opinion to a discussion of how the various proivsions of MICRA will impact the judgment as entered once the matter is remanded to the trial court for further proceedings.

We first address the effect of plaintiff's pretrial settlement with Temple Hospital for $500,000. While con-

ceding the fact of such a settlement, plaintiff contends that defendant is not entitled to a pro tanto reduction of the judgment under Code of Civil Procedure section 877.[18]

California formerly adhered to the common law doctrine denying contribution among joint tortfeasors and viewing the release of one as a release of all. The theory behind this rule was that there could be only one compensation for a joint wrong and since each joint tortfeasor was responsible for the whole damage, payment by anyone of them satisfied plaintiff's claim against all. Whether this rule applied also to concurrent tortfeasors was open to question. (*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 493; see also 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 38, pp. 2336-2337.)

This state's tort contribution legislation was enacted in 1957 in an attempt to ameliorate the harsh effects of the no-contribution rule upon joint tortfeasors. As observed by the court in *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, 993: "The major goals of the 1957 tort contribution legislation are, first, equitable sharing of costs among the parties at fault, and second, encouragement of settlements." As part of that legisla-

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18. Code of Civil Procedure section 877 provides as follows: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort— [¶] (a) It shall not discharge any other tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and [¶] (b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors."

tion, section 877 permits pre-verdict releases "given in good faith" to one of several tortfeasors. That release completely discharges the settlor, prevents contribution claims against him by the eventual judgment debtor and results in a pro tanto reduction of the amount the injured party may collect from the nonsettling defendant debtor. (See *De Cruz v. Reid* (1968) 69 Cal.2d 217, 225-226.) The purpose of such a reduction is to avoid the double recovery and unjust enrichment a plaintiff would enjoy if he were able to collect part of his total claim from one tortfeasor and all from another. (*De Cruz v. Reid, supra; Helling v. Lew* (1972) 28 Cal.App.3d 434; *Wouldridge v. Zimmerman* (1971) 21 Cal.App.3d 656.)

In the case at bench, plaintiff claims that the Legislature impliedly excepted Code of Civil Procedure section 877 from medical malpractice litigation when it limited recovery of noneconomic damages to $250,000. (Civ. Code, § 3333.2.) She reasons that Civil Code section 3333.2 foreclosed the possibility of a "double recovery" because its provisions preclude her from receiving complete satisfaction for her losses. Plaintiff thus concludes that she is entitled to the full amount of the jury's verdict without any reduction under Code of Civil Procedure section 877. As before, this argument wrongly assumes that an injured party possesses a vested right to a particular measure of damages, that MICRA arbitrarily limits that right, and that the Legislature must, in some way, provide malpractice victims with a quid pro quo for the restrictions it has imposed. Each of these "assumptions" have been previously rejected and we need not again discuss them in any detail.

Needless to say, the goals of the contribution legislation remain the same whether or not there exist limitations on the recovery of damages in any particular action. The fact that the Legislature has seen fit to impose such limits in medical malpractice actions is no reason to burden a nonsettling defendant with the entirety of the judgment. That there is a difference between encouraging and forcing settlement needs little discussion. The fear of a large unshared judgment very likely could propel the last remaining defendant into a settlement far exceeding the plaintiff's remaining damages and transcending that defendant's equitable share. If we were to accept plaintiff's argument, we also would be required to hold, in accord with the common law rule, that release of one tortfeasor releases all. We are certain that plaintiff would not favor such a result.

Section 877 expressly requires that a judgment be reduced by amounts paid by settling joint tortfeasors. (*Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 110; *Jaramillo v. State of California* (1978) 81 Cal.App.3d 968, 971.) Nothing in MICRA or the tort contribution statutes even remotely suggests that the Legislature intended to create an exception to section 877 when it limited noneconomic damages in medical malpractice actions. Plaintiff's contention must therefore fail.

We further reject the argument that defendant waived any right to a settlement offset by failing to submit the existence and amount of the Temple Hospital settlement to the jury. Although the reduction of an award under Code of Civil Procedure section 877 may present subsidiary questions of fact (*Albrecht v. Broughton* (1970) 6 Cal.

App.3d 173, 177), the issue need not be submitted to the jury where the plaintiff concedes the fact and amount of settlement. (*Syverson v. Heitmann, supra,* 171 Cal.App.3d 106, 111; *Cseri v. D'Amore* (1965) 232 Cal.App.2d 622, 625.) "[W]here the fact of settlement is undisputed and the fact of liability is disputed, that information may confuse the jury and prejudice the cause of the remaining litigants, and its use is frowned upon. [Citations.] The better practice is thought to be for the trial court to adjust recoveries against joint tortfeasors in accordance with previously arrived settlements after the jury's verdict has been returned." (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 13.)

Here, neither the existence nor the amount of the settlement is subject to dispute. On the eve of trial, plaintiff filed a motion "for an order finding a good faith settlement between plaintiff and the defendant, Temple Hospital, entered into on June 2, 1983, in the amount of $500,000." That motion was accompanied by supporting declarations and points and authorities. We view these documents as an admission by plaintiff respecting the fact and amount of the settlement. (See *Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 832.) Although the parties never formally stipulated on the record to the terms of the agreement, plaintiff fails to explain how she was prejudiced by not having the jury made aware of the settlement. The truth of the matter is that there was no factual dispute to be resolved and that plaintiff was not entitled to litigate a nonexistent issue. (See *Albrecht v. Broughton, supra,* 6 Cal.App.3d 173, 178; *Cseri v. D'Amore, supra,* 232 Cal.App.2d 622, 625.)

Having concluded that defendant is entitled to an offset under Code of Civil Procedure section 877, we must now determine how the trial court upon remand should calculate the amount of the judgment. The pivotal issue is whether the pretrial settlement should be deducted from the total sum of damages awarded by the jury before or after the noneconomic portion of the verdict has been reduced to $250,000.

If the amount of the settlement is deducted first, the amount by which plaintiff's total damages will be reduced is less than if the limitation of Civil Code section 3333.2 is applied to the total damage figure first. As we see it, the adoption of the former approach would effectively vitiate the Legislature's express intention of limiting a plaintiff's recovery of noneconomic damages and thwart the goals of section 877. Applying the offset to the verdict after damages for noneconomic loss have been reduced pursuant to Civil Code section 3333.2 also comports with the reduction methods advanced in several analagous cases. (See *Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 Cal.App.3d 162; *Lemos v. Eichel* (1978) 83 Cal.App.3d 110; *Jaramillo v. State of California, supra,* 81 Cal.App.3d 968, 970-971.)

Based upon the foregoing, the trial court should compute the judgment by reducing the jury's award for noneconomic loss to $250,000, add that amount to the sum representing compensation for pecuniary losses, and offset the total by the consideration paid in settlement.[19]

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19. In their briefs the parties debate at considerable length how the amount paid in settlement should be allocated between

(Continued on following page)

Contrary to the view espoused by defendant, we think it improper at this stage of the proceedings to direct the trial court to formulate a schedule of periodic payments in any particular fashion. Let there be no doubt, however, that the court is under a mandatory duty to enter a judgment for periodic payments in accordance with defendant's request. (See *Fein v. Permanente Medical Group, supra,* 38 Cal.3d 137, 154-155.) In carrying out that duty, the trial court is to be guided by the evidence, the interests of the parties, and the "statutory purpose of affording a fair correlation between the sustaining of losses and the payment of damages." (*American Bank & Trust Co. v. Community Hospital, supra,* 36 Cal.3d 359, 376.)

In accordance with our earlier discussion respecting the nature of future damages, we do think it appropriate to emphasize that only the gross amount of plaintiff's projected future losses may be used in devising a series of periodic payments, not the sum she could have earned on those losses if invested as a lump sum. A contrary holding would require a medical malpractice defendant to invest the entire future damage portion of the judgment in order to fund the stream of deferred payments, thus, contravening the purpose and intent of Code of Civil Procedure sec-

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past and future damages. We need not resolve that issue on this appeal. Both plaintiff and Temple Hospital apparently elected to have the settlement paid in one lump sum and chose not to apportion it in any particular fashion. We must presume, therefore, that this single payment represented an estimate of the amount needed to compensate plaintiff for past and future damages discounted to present value. (See 7 Conason, Damages in Tort Actions (1985) § 84.00 [2].) Absent any form of structured settlement, we will not now attempt to allocate the consideration paid under the agreement.

tion 667.7. (See *American Bank, supra,* 36 Cal.3d 359, 372-373.)

We also note, again in conformity with our previous discussion, that plaintiff is not entitled to post-judgment interest on periodic payments not yet due. Code of Civil Procedure section 685.020, subdivision (b) specifically commands that "[u]nless the judgment otherwise provides, if a money judgment is payable in installments, interest commences to accrue as to each installment on *the date the installment becomes due.*" (Emphasis added.) The phrase "unless the judgment otherwise provides" appears to refer only to the authority conferred on municipal or justice courts by Code of Civil Procedure section 85 and on small claims courts under Code of Civil Procedure section 117 to fix the term and conditions of payment of money judgments. (See Leg. Committee com., Senate 1982 Addition and Law Rev. Comm. com. 1983 Amendment to Code Civ. Proc., § 685.020 [1987 cumulative pocket part] pg. 40.) As the clause presently reads, it has no application to superior court judgments. Under the terms of the statute, therefore, interest only begins to accrue when a periodic payment comes due, not before.

We turn next to the issue of prejudgment interest awarded plaintiff pursuant to Civil Code section 3291. That statutes provides in pertinent part: "In any action brought to recover damages for personal injury sustained by any person resulting from or occasioned by the tort of any other person, . . . whether by negligence or by willful intent of the other person, . . . and whether the injury was fatal or otherwise, it is unlawful for the plaintiff in the complaint to claim interest on the damages alleged as pro-

vided in this section. [¶] If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure[20] which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment."

Following trial, plaintiff filed an amended memorandum of costs claiming $354,295, $311,917 of which constituted prejudgment interest under Civil Code section 3291. Although defendant moved to tax costs, he did not object to plaintiff's request for prejudgment interest. The trial court subsequently awarded $345,902 in total costs, but did not strike any portion of plaintiff's claim for prejudgment

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20. At the time of trial, Code of Civil Procedure section 998 provided in relevant part: "(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section. [¶] (b) Not less than 10 days prior to commencement of trial as defined in subdivision 1 of Section 581, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time. If such offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. If such offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial. [¶] . . . . [¶] (d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment, the court in its discretion may require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, the preparation of trial of the case by the plaintiff, in addition to plaintiff's costs."

interest. Defendant later filed a timely notice of appeal from that portion of the postjudgment order denying his motion to tax costs.

Plaintiff argues that we may not review the award of prejudgment interest in light of defendant's failure to object at the trial court level. (See *Davis Lumber Co. v. Hubbell* (1955) 137 Cal.App.2d 148, 150-151; *S.F. etc. Sch. Dist. v. Bd. of Nat. Missions* (1954) 129 Cal.App.2d 236, 243.) Although we agree in principle with plaintiff's argument, the unique procedural posture of the instant case compels a consideration of defendant's claim.

"The provisions of Civil Code section 3291 make clear a plaintiff is not entitled to prejudgment interest as a matter of course; rather, prejudgment interest is authorized only if the defendant fails to accept a Code of Civil Procedure section 998 offer to settle and the *judgment* exceeds the amount of the offer." (*Gutierrez v. State Ranch Services* (1983) 150 Cal.App.3d 83, 85; emphasis added.) As we read the statute, entitlement to prejudgment interest is determined by the amount of the judgment as entered rather than the gross verdict. (See *Syverson v. Heitmann, supra,* 171 Cal.App.3d 106, 114.) In the case at bench, this would require the trial court to reduce the verdict by the limitation imposed by Civil Code section 3333.2 (i.e., $250,000) and by the amount of the settlement with Temple Hospital ($500,000) before comparing it to plaintiff's pretrial offer under Code of Civil Procedure section 998. (See discussion, *supra.*

Prior to ruling on defendant's motion to tax costs, the trial court had refused to apply MICRA and reduce the verdict in accordance with its provisions. Without

such a reduction the total amount of the judgment clearly exceeded either of plaintiff's two statutory offers to settle. Thus, in light of the court's finding that MICRA was unconstitutional, defendant had no reason to object to plaintiff's demand for prejudgment interest. Having found MICRA inapplicable, the trial court's ruling under Civil Code section 3291 was preordained and thus deprived defendant of a basis for asserting that prejudgment interest was not warranted.

Based upon the foregoing, we calculate the net amount of the reduced-to-present-value judgment to be $2,917,000.[21] When that sum is compared with the $4 million settlement offer proposed in January 1983,[22] it becomes obvious that plaintiff is not entitled to prejudgment interest under section 3291. Accordingly, the award of costs must be reduced by $311,917.

Defendant's final contention concerns the application of Business and Professions Code section 6146 to the facts of the instant case. That statute establishes a maximum fee for representation of clients in professional negligence

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21. The figure of $2,917,000 is derived by reducing the jury's award for noneconomic loss to $250,000, adding that amount to the sum representing compensation for future pecuniary loss, as reduced to present value (see *Franck v. Polaris E-Z Go Div. of Textron, Inc.* (1984) 157 Cal.App.3d 1107, 1118-1120), and offsetting the total ($3,167,238) by the consideration paid in settlement ($500,000).

22. Plaintiff urges that the judgment be compared with her offer to settle for $1 million made in March 1982. We choose to follow, however, the rule laid down in *Gutierrez, supra,* that prejudgment interest is proper only when the judgment is greater than a valid settlement offer under Code of Civil Procedure section 998 made on or after January 1, 1983. (*Gutierrez v. State Ranch Services, supra,* 150 Cal.App.3d 83, 88.)

suits against health care providers. Under the terms of the section no attorney may contract for or collect a contingent fee greater than 40 percent of the first $50,000 recovered, 33⅓ percent of the next $50,000 recovered, 25 percent of the next $100,000 recovered, and 10 percent of the amount recovered over $200,000. It is irrelevant whether the recovery is by settlement, arbitration, or judgment.[23]

The trial court in our case, having concluded that MICRA was unconstitutional, did not apply Business and Professions Code section 6146 and the record contains no mention whatsoever of plaintiff's attorney's fees. Defendant nonetheless argues that we should take this opportunity to explain how fees are to be calculated and paid under the statute. Plaintiff protests, claiming that defendant lacks standing to raise the issue.

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23. Business and Professions Code section 6146 provides in relevant part: "(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits: [¶] (1) Forty percent of the first fifty thousand dollars ($50,000) recovered. [¶] (2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered. [¶] (3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered. [¶] (4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000). [¶] The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind. [¶] . . . [¶] (c) For purposes of this section: [¶] (1) 'Recovered' means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose. . . ."

Although we agree with the proposition that a malpractice defendant may have some interest in seeing section 6146 properly applied, we are of the view that, at least at this stage of the proceedings, we should withhold comment on how the statute is to be construed in any given instance. In *Roa v. Lodi Medical Group, Inc., supra,* 37 Cal.3d 920, the Supreme Court concluded that the limits imposed by the section are not unconstitutional on their face. Here, however, we are not faced with broad questions concerning the validity of the legislative provisions, but with the much narrower problem of determining the proper application of the statute. The trial court has yet to make any rulings in this regard and no dispute has arisen between plaintiff and her counsel as to how fees are to be computed and paid. At present *no* party has been aggrieved by any order of the court below and there exists no controversy that demands resolution. Under the circumstances, we must defer consideration of the issue until it is properly before us.

We have reviewed all remaining questions posed by both parties and find none that warrant further discussion.

The judgment and order appealed from are reversed and the matter is remanded to the trial court for further proceedings consistent with the views expressed herein. Both parties to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

/s/ Compton, J.
COMPTON

We concur:
/s/ Roth, P.J.
ROTH

/s/ Gates, J.
GATES, J.

APPENDIX B

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 2, No. B002436
S000682

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

GREEN, Respondent,

v.

FRANKLIN, M.D., Appellant.

(Filed July 16, 1987)

Respondent's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed March 12, 1987, which appears at 190 Cal.App.3d 93. (Cal. Const., Art. VI, sec. 14; Rule 976, Cal. Rules of Court.)

LUCAS
Chief Justice

APPENDIX C

2d Civil No. B002436

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

CASSANDRA GREEN,

Appellant,

vs.

ARAM FRANKLIN, M.D.,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

(Filed August 24, 1987)

Notice is hereby given that Cassandra Green hereby appeals to the Supreme Court of the United States from the final judgment and decision of the California Court of Appeal, Second District, Division Two, reversing the decision of the trial court, which judgment and decision was entered in this action on March 12, 1987.

This appeal is taken pursuant to 28 U.S.C. section 1257(2).

Dated: August 20, 1987

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• • •

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STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am a resident of/employed in the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my address/residence address is: 1222 Sixth Street, Santa Monica, CA 90401. *On* August 21, 1987, *I served the within* Notice of Appeal to the Supreme Court of the United States *on the* attorneys of record *in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at* Santa Monica, CA *addressed as follows:*

Honorable Robert C. Nye, Department 38, Los Angeles County Superior Court, 111 North Hill Street, Los Angeles, CA

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I certify (or declare), under penalty of perjury, that the foregoing is true and correct.*

Executed on August 21, 1987 (date) *at* Santa Monica (place), *California*

/s/ Billie Douglas
(Signature) BILLIE DOUGLAS

**Both the verification and proof of service by mail forms, being signed under penalty of perjury, do not require notarization.*

Supreme Court, U.S.
FILED
NOV 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-637

In The
Supreme Court of the United States
October Term, 1987

CASSANDRA GREEN,
Appellant,

vs.

ARAM FRANKLIN, M.D.,
Appellee.

On Appeal From The Court of Appeal of California

MOTION TO AFFIRM OR DISMISS

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No. 87-637

In The
Supreme Court of the United States
October Term, 1987

CASSANDRA GREEN,
Appellant,

vs.

ARAM FRANKLIN, M.D.,
Appellee.

On Appeal From The Court of Appeal of California

MOTION TO AFFIRM OR DISMISS

Appellee Aram Franklin, M.D., moves for summary affirmance of the judgment of the California Court of Appeal rejecting appellant's contention that California Civil Code section 3333.2 effectuates a taking without just compensation in violation of the Fifth and Fourteenth Amendments. Alternatively, appellee moves that this appeal be dismissed on the ground it does not present a substantial federal question.

STATEMENT OF THE CASE

This is an appeal from a decision of the California Court of Appeal rejecting appellant's contention that California Civil Code section 3333.2, which places a $250,000 ceiling on recovery for noneconomic losses in a medical malpractice action, denies her due process and equal protection and effectuates an unconstitutional taking without just compensation. Appellant does not contend the California Court of Appeal erroneously rejected her due process and equal protection claims; her appeal is limited to her claim under the Takings Clause of the Fifth Amendment.

Appellant's statement of the case adequately sets forth the relevant facts from the record with this exception: According to appellant, her taking argument was rejected by the Court of Appeal because it "felt bound by the California Supreme Court's opinions in *Fein* [*v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665, 211 Cal.Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985)] and in an earlier case, *American Bank & Trust Co. v. Community Hospital*, 36 Cal.3d 359 [683 P.2d 670, 204 Cal.Rptr. 671 (1984)], even though neither case had addressed or decided the taking question." Jurisdictional Statement 5. This is hardly a fair characterization of the Court of Appeal's decision. It even implies the Court of Appeal *reluctantly* rejected appellant's constitutional attack. To the contrary, the Court of Appeal said: "Although we think it clear that the arguments raised on this appeal have been definitively answered by our Supreme Court, we have chosen to address plaintiff's contentions in order

to dispel any lingering doubt that MICRA passes constitutional muster." Jurisdictional Statement 9a-10a.

The Court of Appeal addressed appellant's taking argument as follows:

> "Plaintiff's argument that Civil Code section 3333.2 is constitutionally infirm . . . because it effectuates a taking without just compensation is premised on the notion that she, along with all other victims of medical malpractice, are entitled to a particular measure of damages. That claim was laid to rest by the Supreme Court when it held that a plaintiff has no constitutional property right or interest in the manner damages may be awarded, and that the Legislature possesses 'broad control over *the measure*, as well as *the timing*, of damages' and 'may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest.' (*Fein, supra*, at p. 158; emphasis in original; *American Bank & Trust Co. v. Community Hospital, supra*, 36 Cal.3d 359, 368-369.) Consistent with this conclusion was the court's further determination that when the Legislature decreased the measure of recovery for noneconomic damages, it was not required to compensate plaintiffs for any loss reduction occasioned thereby by providing them with a quid pro quo. (*Fein, supra*, at p. 157.) In light of these principles, plaintiff's contentions are meritless." Jurisdictional Statement 14a.

SUMMARY OF ARGUMENT

This is not the first time a California appellate decision upholding California Civil Code section 3333.2 against constitutional attack has been appealed to this Court. In

Fein v. Permanente Medical Group, 38 Cal.3d 137, 695 P.2d 665, 211 Cal.Rptr. 368 (1985), the California Supreme Court held section 3333.2 does not violate due process or equal protection. Fein appealed and this Court dismissed his appeal for want of a substantial federal question. *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985).[1]

Now appellant brings section 3333.2 again before this Court, arguing it violates the Fifth Amendment's Takings Clause. Since section 3333.2 has survived a due process attack which was predicated in substantial part on the argument that the Legislature may not limit a pre-existing right without providing a *quid pro quo*, see *Fein*, 474 U.S., at 894-95 (White, J., dissenting), "it would be surprising indeed to discover now" *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, —, 106 S.Ct. 1018, 1025, 89 L.Ed. 2d 166, 178 (1986) that compensation is required under the Fifth Amendment.

Viewed on its face and as applied in this case, section 3333.2 does not violate the Takings Clause. First, appellant's claim for the common-law measure of noneconomic damages does not constitute property within the meaning of the Takings Clause. Property interests are created and their dimensions defined by sources independent of the Constitution, such as state law. Under California law, a plaintiff has no vested right in a particular measure of damages. This is consistent with this Court's previous

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[1] In *Roa v. Lodi Medical Group, Inc.*, 37 Cal.3d 920, 695 P.2d 164, 211 Cal.Rptr. 77 (1985), the California Supreme Court rejected a constitutional attack on California Business and Professions Code section 6146, which limits attorneys' fees in medical malpractice actions. This Court also dismissed the appeal in *Roa* for want of a substantial federal question. *Roa v. Lodi Medical Group, Inc.*, 474 U.S. 990 (1985).

statements that a person has no property, no vested interest, in any rule of the common law.

Even assuming arguendo that appellant's claim for the common-law measure of noneconomic damages is a species of property, there has been no taking. California has not appropriated any of plaintiff's assets for its own use. Rather, section 3333.2 constitutes regulatory action in response to a major health care crisis. It is a reasonable adjustment of the benefits and burdens of economic life to promote the common good. Plaintiff made no investment of any sort based on an expectation of recovery of the common-law measure of noneconomic damages should she be injured by medical malpractice. Section 3333.2 places no limits on plaintiff's recovery of $3,167,000 in economic damages and permits a substantial $250,000 award for noneconomic damages as well. When the attorneys' fee limitation enacted along with section 3333.2 is considered, as it must be, the impact on plaintiff is to reduce her net recovery under the jury's $5,500,000 total verdict by only about 17 percent. This is not so substantial as to constitute a taking under this Court's precedents.

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ARGUMENT

I.

CALIFORNIA CIVIL CODE SECTION 3333.2 IS PART OF A COMPREHENSIVE PACKAGE OF STATUTES DESIGNED TO ALLEVIATE A CRISIS IN CALIFORNIA'S HEALTH CARE SYSTEM CAUSED BY SKYROCKETING MEDICAL MALPRACTICE INSURANCE PREMIUMS.

In May 1975 the Governor of California convened the Legislature in extraordinary session to consider measures aimed at remedying a crisis in health care. The nature of the crisis was described by the California Supreme Court in *American Bank & Trust Co. v. Community Hospital*, 36 Cal.3d 359, 371, 683 P.2d 670, 677-78, 204 Cal.Rptr. 671, 678-79 (1984):

> "The problem . . . arose when the insurance companies which issued virtually all of the medical malpractice insurance policies in California determined that the costs of affording such coverage were so high that they would no longer continue to provide such coverage as they had in the past. Some of the insurers withdrew from the medical malpractice field entirely, while others raised the premiums which they charged to doctors and hospitals to what were frequently referred to as 'skyrocketing' rates. As a consequence, many doctors decided either to stop providing medical care with respect to certain high risk procedures or treatment, to terminate their practice in this state altogether, or to 'go bare,' i.e., to practice without malpractice insurance. The result was that in parts of the state medical care was not fully available, and patients who were treated by uninsured doctors faced the prospect of obtaining only unenforceable judgments if they should suffer serious injury as a result of malpractice."

See *id.*, at 363 n.1, 683 P.2d, at 672 n.1, 204 Cal.Rptr., at 673 n.1 (quoting the Governor's executive proclamation calling the Legislature into extraordinary session); *Hoffman v. United States*, 767 F.2d 1431, 1434 (9th Cir. 1985).

The Legislature, "which thoroughly investigated this matter through numerous hearings, audits and the like," *American Bank & Trust, supra*, 36 Cal. 3d, at 372, 683 P.2d, at 678, 204 Cal. Rptr., at 679, expressly found and declared

> " 'that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state.' " *Id.*, at 372 n.11, 683 P.2d, at 678 n.11, 204 Cal.Rptr., at 679 n.11.

The Legislature responded to the crisis by enacting the Medical Injury Compensation Reform Act of 1975 (MICRA),

> "a lengthy statute which attacked the problem on several fronts. In broad outline, the act (1) attempted to reduce the incidence and severity of medical malpractice injuries by strengthening governmental oversight of the education, licensing and discipline of physicians and health care providers, (2) sought to curtail unwarranted insurance premium increases by authorizing alternative insurance coverage programs and by establishing new procedures to review substantial rate increases, and (3) attempted to reduce the cost and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation." *American Bank & Trust*, 36 Cal.3d, at 363-64, 683 P.2d, at 672, 204 Cal. Rptr., at 673.

MICRA provisions "made changes in existing tort rules in an attempt to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums." *Fein v. Permanente Medical Group, supra,* 38 Cal.3d, at 159, 695 P.2d, at 680, 211 Cal.Rptr., at 383. Specifically, these changes are designed to:

1. Permit the defendant to introduce evidence of collateral source recovery by the plaintiff and the plaintiff to introduce evidence of the amount paid or contributed to secure the right to such benefits. Cal. Civ. Code § 3333.1, subd. (a), upheld in *Fein,* 38 Cal.3d, at 164-67, 695 P.2d, at 784-86, 211 Cal.Rptr., at 387-90.

2. Eliminate the subrogation rights of a collateral source. Cal. Civ. Code § 3333.1, subd. (b), upheld in *Barme v. Wood,* 37 Cal.3d 174, 689 P.2d 446, 207 Cal.Rptr. 816 (1984).

3. Limit recovery of nonpecuniary loss to $250,000. Cal. Civ. Code § 3333.2, upheld in *Fein,* 38 Cal.3d, at 157-64, 695 P.2d, at 679-84, 211 Cal.Rptr., at 382-87.

4. Require periodic payment of any award for future damages which equals or exceeds $50,000. Cal. Code Civ. Proc. § 667.7, upheld in *American Bank & Trust.*

5. Limit contingent fee payments to attorneys. Cal. Bus. & Prof. Code § 6146, upheld in *Roa v. Lodi Medical Group, Inc., supra,* 37 Cal.3d 920, 695 P.2d 164, 211 Cal. Rptr. 77.

6. Shorten the statute of limitations. Cal. Code Civ. Proc. § 340.5, upheld in *Kite v. Campbell,* 142 Cal.App.3d 793, 191 Cal.Rptr. 363 (1983), *overruled on other grounds,*

Young v. Haines, 41 Cal.3d 883, 718 P.2d 909, 226 Cal.Rptr. 547 (1986).

7. Require 90 days' notice to the defendant before filing suit. Cal. Code Civ. Proc. §§ 364-65.

8. Permit arbitration agreements between doctors and patients. Cal. Code Civ. Proc. § 1295.

By these tort reforms and the other MICRA reforms in the areas of health care quality control and review of insurance premium increases[2]

> "the Legislature hoped (1) to restore insurance premiums to a level doctors and hospitals could afford, thereby inducing them to resume providing medical care to all segments of the community, and (2) to insure that insurance would in fact be available as a protection for patients injured through medical malpractice." *American Bank & Trust*, 36 Cal.3d, at 372, 683 P.2d, at 678, 204 Cal.Rptr., at 679.

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[2]Assemblyman Barry Keene, author of MICRA, explained:

> "A general policy (and . . . *political)* decision was made that all interested parties must sacrifice in order to reach a fair and rational solution to the insurance crisis. These included physicians, lawyers, insurance companies, and patients alike. [MICRA] was drafted to include all reforms in order to prevent any one interest group from sabotaging any single-objective bill."

Keene, "California's Medical Malpractice Crisis" in *A Legislator's Guide to the Medical Malpractice Issue* 27, 30 (1976, Health Policy Center, Georgetown University and The National Conference of State Legislatures), emphasis in original.

> "[B]y pitting the various concerned and powerful interest groups against one another, while preserving the delicate balance among them, we had a better chance of getting something out. This is called the 'equal bite' theory behind [MICRA]."

Id., at 33.

MICRA has had the desired impact. It created enough promise of stability to encourage doctors to form their own insurance carriers. By January 1982, 80 percent of the members of the California Medical Association were insured by physician-owned carriers or a cooperative trust, according to a CMA survey. California Medical Association, *Socioeconomic Report,* Vol. XXII, No. 5 (July/Aug. 1982), at 30. Only 6.1 percent of the CMA members surveyed were uninsured. *Ibid.*

II.

BOTH ON ITS FACE AND AS APPLIED IN THIS CASE, SECTION 3333.2 DOES NOT VIOLATE THE TAKINGS CLAUSE.

"The Fifth Amendment provides 'nor shall private property be taken for public use, without just compensation,' and applies to the States through the Fourteenth Amendment." *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. —, — n.4, 107 S.Ct. 2378, 2383 n.4, 96 L.Ed.2d 250, 261 n.4 (1987). In order to demonstrate that section 3333.2 deprives her of property without just compensation, plaintiff first must establish that her claim against Dr. Franklin for the common-law measure of noneconomic damages constitutes property for purposes of the Fifth Amendment. Then plaintiff must establish that her claim for the common-law measure of noneconomic damages was taken by California for a public purpose. As we explain below, plaintiff fails on both counts.

A. Plaintiff's Claim For The Common-Law Measure Of Noneconomic Damages Does Not Constitute Property Within The Meaning Of The Takings Clause.

As this Court has recognized, "'"[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). The relevant principles of California law were recently stated by the California Supreme Court: "It is well established that a plaintiff has no vested property right in a particular measure of damages, and that the Legislature possesses broad authority to modify the scope and nature of such damages. [Citations.]" *American Bank & Trust*, 36 Cal.3d, at 368, 683 P.2d, at 676, 204 Cal.Rptr., at 677. Accord *Fein*, 38 Cal.3d, at 158, 695 P.2d, at 680, 211 Cal.Rptr., at 383 ("As our language in *American Bank* itself suggests, our past cases make clear that the Legislature retains broad control over *the measure*, as well as *the timing*, of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and that the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest," emphasis in original). These principles are in accord with this Court's statement in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978):

> "Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' [Citation.] The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law,

> to attain a permissible legislative object,' [citation], despite the fact that 'otherwise settled expectations' may be upset thereby. [Citations.] Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts. [Citations.]''

Other authorities supporting the view that plaintiff's claim for the common-law measure of noneconomic damages is not property include *Hammond v. United States*, 786 F.2d 8, 11-12, 15 (1st Cir. 1986); *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978). Contra *In re Consol. U.S. Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987); *In re Aircrash in Bali, Indonesia, on April 22, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982).

Accordingly, although the jury assessed the amount of plaintiff's noneconomic damages at $2,332,762 under common-law standards, Jurisdictional Statement 4a, plaintiff did not have a vested property right in the full amount awarded by the jury. Plaintiff's cause of action against Dr. Franklin accrued in 1977. Jurisdictional Statement 2a. Civil Code section 3333.2, placing a $250,000 limit on the common-law right of recovery of noneconomic damages against a health care provider, was enacted in 1975. *Ibid.* Thus, plaintiff's cause of action did not accrue until after passage of section 3333.2. The only way plaintiff could claim a vested property right in the full amount awarded by the jury would be if plaintiff had obtained a final, unreviewable judgment in that amount prior to enactment of section 3333.2. See *Hammond*, 786 F.2d, at 12. She did not. The jury's award of noneconomic damages under common-law standards is not plaintiff's property within the meaning of the Takings Clause. The California Court

of Appeal properly ordered it reduced to $250,000 pursuant to section 3333.2, Jurisdictional Statement 19a-20a.

B. Even Assuming Arguendo That Plaintiff's Claim For The Common-Law Measure Of Noneconomic Damages Is Property, There Has Been No Taking.

"The framework for examining the question of whether a regulation of property amounts to a taking requiring just compensation is firmly established and has been regularly and recently reaffirmed." *Hodel v. Irving*, 481 U.S. —, —, 107 S.Ct. 2076, 2082, 95 L.Ed.2d 668, 678 (1987).

> "In evaluating whether governmental regulation of property constitutes a 'taking' we have 'eschewed the development of any set formula . . . and have relied instead on an ad hoc, factual inquiry into the circumstances of each particular case.' [Citation.] 'To aid in this determination, however, we have identified three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." [Citation.]' " *Bowen v. Gilliard*, 483 U.S. —, —, 107 S.Ct. 3008, 3020, 97 L.Ed.2d 485, 504 (1987).

Neither of these three factors points in plaintiff's favor.

We discuss the three factors in reverse order, beginning with "the character of the governmental action." Section 3333.2 does not permit a physical invasion of plaintiff's property. California has not appropriated any of plaintiff's assets for its own use. Rather, section 3333.2 constitutes regulatory action which places a $250,000 ceiling on plaintiff's recovery of noneconomic damages, and

that of all persons injured by medical malpractice, in order "to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums." *Fein*, 38 Cal.3d, at 159, 695 P.2d, at 680, 211 Cal.Rptr., at 383; see *Hoffman v. United States*, *supra*, 767 F.2d, at 1437. "[T]he Legislature was acting in a situation in which it had found that the rising cost of medical malpractice insurance was posing serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments." *Fein*, 38 Cal.3d, at 158, 695 P.2d, at 680, 211 Cal.Rptr., at 383; *Hoffman*, 767 F.2d, at 1437. "Faced with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting judgments for *any* of their damages—pecuniary as well as nonpecuniary—the Legislature concluded that it was in the public interest to attempt to obtain some cost savings by limiting noneconomic damages."[3] *Fein*, 38 Cal.3d, at 160, 695 P.2d., at 681, 211 Cal.Rptr., at 384, emphasis in original.

As with the limitation on liability for nuclear accidents involved in *Duke Power*, section 3333.2 "emerges as a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and ben-

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[3] The California Supreme Court pointed out "the inherent difficulties in placing a value on such [noneconomic] losses, [and] the fact that money damages are at best only imperfect compensation for such intangible injuries . . . ." *Fein*, 38 Cal.3d, at 159, 695 P.2d, at 680-81, 211 Cal.Rptr., at 384.

efits of economic life.' " *Duke Power*, 438 U.S., at 83. When interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good," the statute is less likely to constitute a taking. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, *reh. denied*, 439 U.S. 883 (1978). For example, in *Connolly v. Pension Benefit Guaranty Corp., supra*, 475 U.S. 211, this Court upheld a federal law requiring an employer who withdraws from a multiemployer pension plan to pay a share of the plan's unfunded vested benefits even though this liability had not been established in the original pension plan trust agreement. The Court held this was not a taking but rather a reasonable economic regulation.

Section 3333.2 was enacted in the public interest. The Legislature specifically found there was a major health care crisis in California. The State's exercise of its police power to resolve this crisis and protect the public health and welfare was justified, and does not require compensation. " 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law' . . . . " *Penn Central*, 438 U.S., at 124.

As to the second factor, section 3333.2 interferes with no reasonable investment-backed expectations of plaintiff. Plaintiff made no investment of any sort based on an expectation of recovery of the common-law measure of noneconomic damages should she be injured by medical malpractice. At the time of her injury, section 3333.2, placing a $250,000 ceiling on recovery of noneconomic damages, had been in effect for two years. For all the reasons ex-

pressed above, where we argue that plaintiff's claim for the common-law measure of noneconomic damages does not even constitute property because there is no vested interest in any rule of the common law, plaintiff's claim certainly does not rise to the level of a reasonable, investment-backed expectation. See *Bowen v. Gilliard, supra,* 483 U.S., at —, 107 S.Ct., at 3020-21, 97 L.Ed.2d, at 505; *In re Consolidated U.S. Atmospheric Testing Litigation, supra,* 820 F.2d, at 989.

The third factor is the economic impact of section 3333.2 on plaintiff. The statute does not abrogate plaintiff's cause of action against Dr. Franklin; it affects only the remedy. And even the affect on the remedy is quite limited. "[T]he Legislature placed no limits whatsoever on a plaintiff's right to recover for all of the economic, pecuniary damages—such as medical expenses or lost earnings—resulting from the injury, but instead confined the statutory limitations to the recovery of noneconomic damages, and — even then — permitted up to a $250,000 award for such damages." *Fein,* 38 Cal.3d, at 159, 695 P.2d, at 680, 211 Cal.Rptr., at 383, emphasis deleted. Plaintiff still will recover a total of $2,917,000 from Dr. Franklin even after section 3333.2 is applied to reduce her noneconomic damages to $250,000.[4] Jurisdictional Statement 40a. The statute does not impair full recovery of plaintiff's economic losses, and it permits a very substantial $250,000 recovery for noneconomic losses.

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[4] Plaintiff's total recovery for her injuries is $3,417,000, which includes a $500,000 settlement with a codefendant. When the settlement is set off against the verdict after noneconomic damages are reduced to $250,000, Dr. Franklin's obligation is $2,917,000. Jurisdictional Statement 40a.

Furthermore, the attorneys' fee limitation in medical malpractice cases enacted at the same time as section 3333.2 in effect shifts much of the burden imposed by section 3333.2 from plaintiff to her attorneys. See *Roa v. Lodi Medical Group, Inc., supra*, 37 Cal.3d, at 932, 695 P.2d, at 171, 211 Cal.Rptr., at 84. California Business and Professions Code section 6146 permits a maximum attorneys' fee of $383,391 on plaintiff's $3,417,000 total recovery. Thus, plaintiff's net recovery is $3,033,609. Without the MICRA provisions, and assuming a conservative 33-1/3 percent contingent fee (40 percent was more the norm in medical malpractice cases), plaintiff's net recovery would have been $3,666,685 ($5,500,000 verdict minus an attorneys' fee of $1,833,315). In other words, considering the impact on plaintiff's recovery of all the MICRA provisions working together, including the attorneys' fee limitation.[5] plaintiff's *net* recovery is only reduced by $633,076 (about 17 percent).[6] [7]

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[5] " '[W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.' " *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. —, —, 107 S.Ct. 1232, 1248, 94 L.Ed.2d 472, 496 (1987). And see *Bowen*, 483 U.S., at —, 107 S.Ct., at 3020, 97 L.Ed.2d, at 505; *Penn Central*, 438 U.S., at 137.

[6] Assuming a 40 percent contingent fee instead of 33-1/3 percent, plaintiff's net recovery would be reduced by only $266,391 (about 8 percent).

[7] In *Shanghai Power Co. v. United States*, 4 Cl.Ct. 237, 246 n.16 (1983), the court observed that the President's settlement of the plaintiff's $144 million claim against the People's Republic of China for $20 million "reduces the claim by only about 85%. In appropriate circumstances, diminutions in value in that amount or greater have been held not to amount to a taking." In the instant case, the diminution in value is *far* less than 85 percent.

Whatever the precise economic impact on plaintiff's claim against Dr. Franklin, it certainly is not so substantial as to constitute a taking under this Court's precedents.

CONCLUSION

For the reasons stated, the judgment of the California Court of Appeal should be summarily affirmed or, in the alternative, this appeal should be dismissed for want of a substantial federal question.

Dated: November 5, 1987.

Respectfully submitted,

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